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IN THE

# Supreme Court Of The United States

October Term, 1991

BARBARA FRANKLIN, SECRETARY OF COMMERCE, *et al.*,
*Appellants,*

*v.*

COMMONWEALTH OF MASSACHUSETTS, *et al.*,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

## BRIEF OF THE STATE OF NEW YORK AND THE PEOPLE OF THE STATE OF CALIFORNIA, EX. REL. DANIEL E. LUNGREN, ATTORNEY GENERAL, AS AMICI CURIAE IN SUPPORT OF APPELLEES

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## BRIEF OF THE STATE OF NEW YORK AND THE PEOPLE OF THE STATE OF CALIFORNIA, EX REL. DANIEL E. LUNGREN, ATTORNEY GENERAL, AS AMICI CURIAE IN SUPPORT OF APPELLEES

### INTEREST OF AMICI CURIAE

Pursuant to United States Supreme Court Rules 37.3 and 37.5, the State of New York and the People of the State of California, *ex rel.* Daniel E. Lungren, Attorney General, submit this brief as amici curiae in support of appellees Commonwealth of Massachusetts, *et al.*

California and New York have a direct and vital interest in the availability of judicial review to ensure that the decennial census mandated by the Constitution is taken in conformity with the Constitution and other requirements of law.[1] California and New York are the two most populous States in the Union. Their populations are also among the most diverse, containing large numbers of disadvantaged and minority groups.

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1 *See City of New York v. United States Dep't of Commerce*, 713 F. Supp. 48, 49-51 (E.D.N.Y. 1989) (California and New York have standing to challenge accuracy of census).

California and New York are currently involved in litigation with the Department of Commerce and the Census Bureau scheduled for trial May 11, 1992.[2] In that litigation, California and New York, joined by 5 other States, 27 cities and municipalities, and 12 organizations and individuals, expect to prove that the 1990 decennial census, like its predecessors at least as far back as 1940, undercounted large numbers of disadvantaged persons and minorities and, thus, undercounted substantial portions of the States and localities in which these persons are concentrated, resulting in a serious dilution of the political power of those areas and their citizens. Further, we expect to show that the Census Bureau recommended that the Secretary adopt significantly more accurate population data that would have substantially corrected the undercount and that the Secretary unreasonably rejected the recommendation of the expert agency. The corrected census would result in apportionment of Congress and congressional and State legislative districts more accurately reflecting the true distribution of the population and, thus, the principle of one person, one vote.

Appellants' contention that all judicial review of census related cases should be foreclosed would vest enormous, unchecked power in a federal bureaucracy. States and local entities as well as individual citizens, although critically dependent on the actions of this bureaucracy, would be blocked from seeking compliance with the Constitution. We submit that federal courts must be available to protect against violations of the most fundamental of constitutional rights. The unreviewable power that appellants would establish is inconsistent with our constitutional system of government.

## SUMMARY OF ARGUMENT

The census is fundamental to the allocation of political power and the assurance of "fair representation". Distribution of representation within Congress, the Electoral College, and State

2 *See City of New York v. United States Dep't of Commerce*, 739 F. Supp. 761 (E.D.N.Y. 1990) (adjustment of census is a justiciable question); *City of New York v. United States Dep't of Commerce*, No. 88 CV 3474, slip op. (E.D.N.Y. Sept. 19, 1991) (denying defendants' motion to dismiss).



legislatures is dependent on this population determination. The efficacy of this Court's constitutional decrees in its apportionment decisions likewise depends upon an accurate census.

The issue here is whether the Secretary of Commerce may, with total immunity from judicial review, act arbitrarily, capriciously or in violation of the requirements of the Constitution. Appellants contend that claims that the Secretary so acted are not justiciable. Appellants do not identify any consideration remotely sufficient to justify the unique and drastic step of foreclosing judicial review in the face of threats to constitutional rights. We respectfully urge that this Court affirm the decision below sustaining the availability of federal judicial review of claims of unconstitutional or arbitrary and capricious conduct of the census.

We also urge that given the need for expedition in matters affecting apportionment, districting and the election process, the three judge court correctly concluded that remand of an invalidated decision to the Secretary of Commerce is not required.

## ARGUMENT

### I. THE CONDUCT OF THE CENSUS IS NOT IMMUNE FROM JUDICIAL REVIEW OF ARBITRARY, CAPRICIOUS OR UNCONSTITUTIONAL EXECUTIVE ACTION.

In establishing the federal legislature, the Framers adopted the "Great Compromise" under which the Constitution would protect the sovereignty of smaller States by granting each State an equal vote in the Senate, while at the same time ensuring that the "members of the House of Representatives should be chosen 'by the people of the several States . . . according to their respective Numbers'". *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964) (quoting U.S. Const. art. I, § 2). To "ensure 'fair representation of the people'", the "Constitution embodied Edmund Randolph's proposal for a periodic census". *Id.* (quoting *The Records of the Federal Convention of 1787* at 580 (Farrand ed. 1911)).

This Court in a series of cases has enforced the "fair representation" standard to require that electoral "districts be apportioned to achieve population equality 'as nearly as is practicable'". *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Wesberry*, 376 U.S. at 7-8) (congressional districts); *see, e.g., Chisom v. Roemer*, 111 S. Ct. 2354 (1991) (State Supreme Court electoral districts); *Board of Estimate of City of New York v. Morris*, 489 U.S. 688 (1989) (city board of estimate districts); *Connor v. Finch*, 431 U.S. 407 (1977) (State legislative districts); *Chapman v. Meier*, 420 U.S. 1 (1975) (same); *Hadley v. Junior College District of Metropolitan Kansas City, Mo.*, 397 U.S. 50 (1970) (junior college trustee districts). Despite repeated objections based on the political question doctrine, this Court has consistently held that the exercise of federal judicial power to ensure "fair representation" is both essential and proper. *See, e.g., United States Dep't of Commerce v. Montana*, No. 91-860, slip op. at 16-17 (U.S. March 31, 1992); *Davis v. Bandemer*, 478 U.S. 109, 123 (1986); *Wesberry*, 376 U.S. at 6; *Baker v. Carr*, 369 U.S. 186, 226 (1962).

The federal judicial review long deemed essential in the enforcement of "fair representation" in apportionment and districting cases is no less essential in challenges that the Secretary acted, with regard to the census, arbitrarily, capriciously or in violation of constitutionally protected rights. According to this Court:

> "The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent 'people' they intended that in allocating Congressmen the number assigned to each State should be determined *solely by the number of the State's inhabitants.*"

*Wesberry*, 376 U.S. at 13 (emphasis added). Clearly, therefore, the determination of the number of the State's inhabitants must be accurate "as nearly as is practicable". *Wesberry*, 376 U.S. at 7-8.



Correction of fundamental inequities in the census may not be left solely to the executive and legislative branches. As the three judge panel in the case at bar held:

> "We blind ourselves, however, to the obvious if we do not recognize that the allocation of the House of Representatives is a matter of intense partisan, parochial and political interest. There is always the prospect that faced with such intense interest, traditional work-a-day rules of administrative law will be reformulated."

*Massachusetts v. Mosbacher*, No. 91-11234-WD, slip op. at 9, (D. Mass. March 13, 1992) (Appendix to Jurisdictional Statement at 92a).[3] The Framers did not believe that Congress could be relied upon to apportion itself. By stipulating both an objective means of apportionment and the decennial periods on which it shall be carried out, the Framers sought to depoliticize the process.[4] Enforcement of fundamental constitutional rights with respect to allocations of political power under the census must not be left without the possibility of judicial review. The plain need for judicial review of challenges to census enumer[illegible] no less compelling than the need, repeatedly recognized b[illegible] Court, for review of challenges to apportionment and districting.[5]

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3 Reliance on Congress as a corrective check fails to recognize "how futile it is to remit the disenfranchised for relief to the body which has failed to enfranchise them". Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057, 1092 (1958). "If a fair representation of the people be not secured, the injustice of the Govt. will shake it to its foundations." 2 *The Founders' Constitution*, art. I, § 2, cl. 3, No. 2 at 103 (Philip B. Kurland and Ralph Lerner eds., 1987) (statement of Edmund Randolph of Virginia). This proposition implicitly underlies a series of Supreme Court decisions adjudicating challenges to apportionment and districting. *See, e.g., Wesberry*, 376 U.S. at 14-15; *Baker*, 369 U.S. at 230; *cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

4 This depoliticization was a conscious choice to avoid "the evils of the English system under which . . . 'rotten boroughs' with few inhabitants were represented in Parliament on or almost on a par with cities of greater population". *Wesberry*, 376 U.S. at 14-15.

5 Indeed, the lower courts have repeatedly held that the issues presented in challenging the census enumeration are justiciable. *Carey v. Klutznick*, 508

Appellants nonetheless contend that the political question doctrine requires that all judicial review of challenges to census accuracy be foreclosed (Jurisdictional Statement at 21-22). In *Montana* this Court held that the political question doctrine does not preclude judicial review of apportionment disputes even where an act of Congress is called into question. *Montana*, slip op. at 16-17. There is no more reason to allow that doctrine to preclude review of administrative decisions affecting the accuracy of the census, on which apportionment depends.[6] In *Baker*, this Court set forth the six limited circumstances where a political question may exist. 369 U.S. at 217. The three judge court below properly examined these six factors and found that they were "not a bar to our resolution of this dispute on the merits". *Massachusetts v. Mosbacher*, No. 91-11234-WD, slip op. at 25 (D. Mass. Feb. 20, 1992) (Appendix to Jurisdictional Statement at 25a).

To protect the core rights dependent on the census, and to provide the States with a means of enforcing the "Great Compromise" between them and the allocation of power for which it provides, this Court should affirm the decision of the three judge court below and make clear the propriety of federal judicial review of claims that the Secretary of Commerce acted arbitrarily, capriciously or in violation of constitutionally protected rights.

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F. Supp. 404, 411 (S.D.N.Y. 1980) ("the precedents sustaining challenges to congressional redistricting should afford a predicate for finding the [census] claims before the court justiciable"); *see also City of New York v. U.S. Dep't of Commerce*, 739 F. Supp. 761, 765 (E.D.N.Y. 1990); *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980); *City of Willacoochee v. Baldrige*, 556 F. Supp. 551, 557 (S.D. Ga. 1983); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 674 (E.D. Pa. 1980); *Young v. Klutznick*, 497 F. Supp. 1318, 1326 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982). *But see Tucker v. United States Dep't of Commerce*, No. 91-2051, slip op. (7th Cir. March 16, 1992), *petition for reh'g filed*.

6 As the court held in *Tucker*, No. 91-2051, slip op. at 8:

> "the political sensitivities that might have been thought to bring the apportionment cases within the scope of the political questions doctrine, but did not, are no greater [in the census context]."



## II. THIS COURT SHOULD NOT REMAND INVALIDATED CENSUS DECISIONS TO THE SECRETARY OF COMMERCE.

This Court should also affirm the lower court's conclusion that remand of the matter to the Secretary of Commerce is not required. Challenges to the accuracy of the census systematically involve a pressing need for expedition.

In assessing the closely analogous question of the circumstances under which a party may properly avoid the requirement of administrative exhaustion, this Court acknowledged that a "prejudice may result . . . from an unreasonable or indefinite time frame for administrative action" and that the danger of such prejudice would "weigh heavily against requiring administrative exhaustion". *McCarthy v. Madigan*, 112 S. Ct. 1081, 1087 (1992); *see also Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 587 (1989); *Gibson v. Berryhill*, 411 U.S. 564, 575 n.14 (1973). This Court further acknowledged that, even when the timing of administrative decision making is not facially unreasonable, the particular circumstances of the plaintiffs may be such that they will suffer "irreparable harm if unable to secure immediate judicial consideration of [their] claim". *McCarthy*, 112 S. Ct. at 1087. *McCarthy* makes clear that in such circumstances this Court would deem exhaustion inappropriate. *Id.* at 1087-88.

Requiring remand of invalidated census decisions to the Secretary could make relief wait upon an "indefinite time frame" and threaten plaintiffs with irreparable injury from any substantial additional delay. In short, remand to the Secretary would result in deprivation of the rights sought to be vindicated.

## CONCLUSION

*Amici* respectfully request this Court to affirm the availability of federal judicial review of challenges that the Secretary of Commerce acted arbitrarily, capriciously or in violation of constitutionally protected rights and to affirm that invalidated census decisions need not be remanded to the Secretary.

Respectfully submitted,

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